

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**PATRICIA A. ARCHER-VAIL,**  
as the administratrix of the  
estate of John F. Vail,  
deceased, and individually,

**Plaintiff,**

**1:17-cv-1113  
(GLS/CFH)**

**v.**

**LHV PRECAST INC. et al.,**

**Defendants.**

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**APPEARANCES:**

**OF COUNSEL:**

**FOR THE PLAINTIFF:**

Marc J. Bern & Partners LLP  
60 East 42nd Street, Suite 950  
New York, NY 10165

ELLIOT M. SCHAKTMAN, ESQ.

**FOR THE DEFENDANTS:**

*LHV Precast Inc.*  
Goldberg, Segalla Law Firm - Albany  
Office  
8 Southwoods Boulevard  
Suite 300  
Albany, NY 12211

WILLIAM J. GREAGAN, ESQ.  
JAMES F. FAUCHER, II, ESQ.

*Wieser Concrete Products, Inc. and  
Wieser Concrete Roxana, LLC*  
Salmon Ricchezza Singer & Turchi,  
LLP - NJ Office  
Tower Commons, Suite 406  
123 Egg Harbor Road  
Sewell, NJ 08080

JEFFREY A. SEGAL, ESQ.

*Spillman Company*  
Catania, Mahon, Milligram & Rider,  
PLLC  
One Corwin Court  
Newburgh, NY 12550

MICHAEL E. CATANIA, ESQ.

**Gary L. Sharpe**  
**Senior District Judge**

### **SUMMARY ORDER**

In or around August 2017, plaintiff Patricia A. Archer-Vail, as the administratrix of the estate of John F. Vail, deceased, and individually, commenced an action in New York Supreme Court in Ulster County against LHV Precast Inc. (LHV), Wieser Concrete Products, Inc. (Wieser Products), Wieser Concrete Roxana, LLC (Wieser Roxana), and Spillman Company.<sup>1</sup> (Dkt. No. 2 at 3.) On October 5, 2017, Wieser Products and Wieser Roxana filed a notice of removal in this court.<sup>2</sup> (Dkt. No. 1.) Subsequently, LHV filed a motion to dismiss, (Dkt. No. 8), and Wieser Products and Wieser Roxana filed one as well, (Dkt. No. 9).

Removal here is improper. 28 U.S.C. § 1441(b)(2) states that “[a]

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<sup>1</sup> “ABC Corporation 1-10 (being a fictitious name as the identity of the corporation(s) and/or company(ies) is/are presently unknown)” is also named as a defendant(s). (Dkt. No. 2 at 3.)

<sup>2</sup> LHV consented to the removal, (Dkt. No. 1, Attach. 3 ¶ 3), and Spillman Company has not indicated that it does not consent.

civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of [Title 28] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” Here, defendant LHV is a citizen of New York, (Dkt. No. 1 ¶ 13(e); 28 U.S.C. § 1332(c)(1)), and was served, (Dkt. No. 1 ¶ 9). Because LHV is a citizen of the State in which this action is brought—i.e., New York—and the instant action is removable solely on the basis of diversity jurisdiction, (Dkt. No. 1 ¶¶ 12-14), removal is improper. *See Confer v. Bristol-Myers Squibb Co.*, 61 F. Supp. 3d 305, 305-06 (S.D.N.Y. 2014) (applying 28 U.S.C. § 1441(b)(2) and positing rationale of statute); *Kucher v. Exceeding Expectations, Inc.*, No. 1:12–CV–00169, 2012 WL 3308892, at \*2 (N.D.N.Y. Aug. 13, 2012).

28 U.S.C. § 1441(b)(2) is a rule of procedure, not a jurisdictional requirement. *See Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 313 (2d Cir. 2005). Nonetheless, a district court may *sua sponte* order remand for a procedural defect within thirty days of the filing of a notice of removal. *See Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth.*, 435 F.3d 127, 131 (2d Cir. 2006); *New York v. Stoddard*, No. 1:06-CV-1320, 2006 WL 3423863, at \*1 n.3 (N.D.N.Y. Nov. 28, 2006).

“In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability.” *Confer*, 61 F. Supp. 3d at 306 (internal quotation marks and citation omitted). This case runs afoul of 28 U.S.C. § 1441(b)(2) and is thus remanded. *See BCAT REO LLC v. Gordon*, No. 15–CV–5093, 2015 WL 5664421, at \*1 (E.D.N.Y. Sept. 24, 2015).

Accordingly, it is hereby

**ORDERED** that this matter be **REMANDED** to New York Supreme Court in Ulster County; and it is further

**ORDERED** that LHV’s motion to dismiss (Dkt. No. 8) is **DENIED AS MOOT**; and it is further

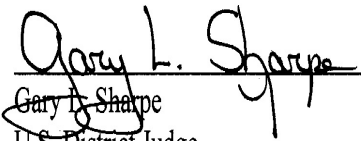
**ORDERED** that Wieser Products’ and Wieser Roxana’s motion to dismiss (Dkt. No. 9) is **DENIED AS MOOT**; and it is further

**ORDERED** that the Clerk provide a certified copy of this Summary Order to New York Supreme Court in Ulster County; and it is further

**ORDERED** that the Clerk provide copies of this Summary Order to the parties.

**IT IS SO ORDERED.**

October 30, 2017  
Albany, New York

  
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Gary L. Sharpe  
U.S. District Judge